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Seah Kok Heng v Khoo Chooi Poh and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
NOS P-04(IM)(NCVC)-354-07 OF 2018 AND
P-04(IM)(NCVC)-362-07 OF 2018
HAMID SULTAN, HANIPAH FARIKULLAH AND KAMALUDIN MD
SAID JJCA

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3 OCTOBER 2019

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Land Law — Indefeasibility of title and interests — Beneficial ownership of property — Respondent filed application for delivery of vacant possession and recovery of outstanding rental against appellant — Respondent filed application for summary judgment in sessions court — Sessions court granted respondent's application — Appellant appealed against sessions court decision to High Court — High Court dismissed appellant's appeal — Appellant appealed against High Court's decision — Whether respondent acquired indefeasible title to property — Whether appellant acquired right in rem or right in personam

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There were two present appeals relating to the same properties in issue, arising from the sessions court. Both appeals were the appellant's appeal in principle, challenging the summary judgment and the subsequent enforcement of the said judgment. Appeal No 354 ('the first appeal') was related to delivery of a vacant possession and recovery of the outstanding rental for the premises. The respondent as a landlord had obtained summary judgment. The appellant's appeal in the High Court was dismissed and hence the current appeal. The Appeal No 362 was related to the appellant's application to strike out the writ of possession and the bailiff's notice of seizure and inventory based on the summary judgment. The application was dismissed by the sessions court. On appeal to High Court, it was dismissed and hence the present appeal by the appellant. The issue arose as who was the owner of the two properties in relation to the title had already been decided by previous proceedings and affirmed by the Court of Appeal. What had not been decided was the appellant's equitable interest in the said properties which were operated as a boutique hotel.

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Held, allowing the appellant's appeal:

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- (1) The facts of the case were not related to the indefeasibility argument of rem rights in the properties. It was not proper to deal with the law on the subject and applied to the facts where the appellant had raised triable issues to satisfy the requirement to have matter heard in full trial. Indefeasibility doctrine might be good for rem rights but not for

personam rights as personam rights would relate to relief as to damages and compensation. Rem right was related to who was the owner of the property. Personam right might relate to suitable compensation or damages. It was a fit and proper case for the trial court to invoke O 14 r 3 of the Rules of Court 2012 and ordered a trial of the claim (see para 10).

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[Bahasa Malaysia summary]

Wujud dua rayuan di hadapan mahkamah berkaitan dengan hartanah yang sama, berbangkit daripada mahkamah sesyen. Kedua-dua rayuan merupakan rayuan perayu dalam prinsip, mencabar penghakiman terus dan pelaksanaan penghakiman tersebut kemudiannya. Rayuan No 354 ('rayuan pertama') berkaitan dengan penyerahan milikan kosong dan pemulihan sewaan tertunggak premis tersebut. Responden sebagai seorang tuan tanah telah mendapat satu penghakiman terus. Rayuan perayu di Mahkamah Tinggi telah ditolak dan membawa kepada rayuan ini. Rayuan No 362 berkaitan dengan permohonan perayu untuk membatalkan writ milikan dan notis rampasan dan inventori bailif berdasarkan penghakiman terus. Permohonan tersebut diketepikan oleh mahkamah sesyen. Semasa rayuan ke Mahkamah Tinggi, ianya diketepikan yang mana telah membawa kepada rayuan ini oleh perayu. Isu yang berbangkit adalah siapakah pemilik dua hartanah berkaitan dengan hakmilik yang telahpun diputuskan oleh prosiding terdahulu dan dikekalkan oleh Mahkamah Rayuan. Apa yang belum diputuskan adalah kepentingan ekuiti perayu dalam hartanah tersebut dimana ianya beroperasi sebagai satu hotel butik.

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Diputuskan, membenarkan rayuan perayu:

- (1) Fakta kes tidak berkaitan dengan hujahan kebolehsangkalan hak-hak in rem dalam hartanah. Ianya tidak wajar untuk berurus dengan undang-undang berkaitan dengan perkara tersebut dan menggunakan fakta yang mana perayu telah membangkitkan isu untuk dibicarakan untuk memenuhi keperluan agar perkara tersebut didengar sewaktu perbicaraan penuh. Doktrin ketidakbolehsangkalan mungkin terpakai untuk hak-hak in rem tetapi bukan untuk hak-hak in personam, memandangkan hak-hak in personam berkaitan dengan relif ganti rugi dan pampasan. Hak-hak in rem berkaitan dengan siapa pemilik hartanah tersebut. Hak-hak in personam mungkin berkaitan dengan ganti rugi atau pampasan yang sesuai. Ianya merupakan satu kes yang bersesuaian untuk mahkamah menguna pakai A 14 k 3 Kaedah-Kaedah Mahkamah 2012 dan memerintahkan perbicaraan tuntutan tersebut (lihat perenggan 10).]

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Notes

For a case on beneficial ownership of property, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 3731.

A Cases referred to

John Lo Thau Fah v FACB Resorts Berhad [2007] 4 MLJ 685; [2007] 8 CLJ 484, HC (refd)

Miles v Bull [1968] 3 All ER 632, QBD (refd)

B *Ngai Heng Book Binder Pte Ltd v. Syntax Computer Pte Ltd* [1988] 2 MLJ 205 (refd)

Peninsular Land Development Sdn Bhd v K Ahmad [1970] 1 MLJ 149, FC (refd)

C *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657; [1999] 2 AMR 1561, FC (refd)**Legislation referred to**

Rules of Court 2012 O 14 r 3, 3(1)

D Appeal from: Civil Appeal Nos PA-12ANCVC-11-04 of 2017 and PA-12ANCVC-69-12 of 2017 (High Court, Pulau Pinang)

M Thayalan (Chong Jun Min with him) (Thayalan & Assoc) for the appellant. Karin Lim Ai Ching (Tan May Xia with her) (Presgrave & Mathews) for the respondent.

E**Hamid Sultan JCA (delivering judgment of the court):****F** [1] There are two appeals before us relating to the same properties in issue, arising from the sessions court. Both appeals are the defendant's appeal in principle, challenging the summary judgment and the subsequent enforcement of the said judgment.**G** [2] Appeal 'No 354' is related to delivery of a vacant possession and recovery of the outstanding rental for the above premises. In this appeal, the plaintiff/respondent as a landlord had obtained summary judgment. The appellant/defendant's appeal in the High Court was dismissed and hence the current appeal.**H** [3] The Appeal 'No 362' is related to the appellant/defendant's application to strike out the writ of possession and the bailiff's notice of seizure and inventory, based on the summary judgment. The application was dismissed by the sessions court. On appeal to the High Court, it was dismissed and hence this appeal by the appellant/defendant.**I**

[4] What is interesting and unique about this case is that the issue as to who is the owner of the two properties in relation to the title had already been decided by previous proceedings and affirmed by the Court of Appeal. However, what has not been decided is the defendant's equitable interest in the said properties

which were operated as a boutique hotel, says the defendant's counsel. Thus, the learned counsel attempts to distinguish a rem and a personam action.

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[5] Both the matter came up for appeal on 20 March 2019. To our mind, the triable issues that the defendant had raised was quite unique and needed further consideration and in consequence, we reserved judgment.

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[6] The brief facts and grounds of the judgment of the learned High Court judge in the Appeal 'No 354' has been placed in a rudimentary manner before us and it reads as follows:

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Brief Facts

(1) The plaintiff is the registered proprietor and landlord of the subject property ie premises No 38 and 40 at Jalan Pintal Tali, Penang situated on Lot 289;

(2) The plaintiff filed an application against the defendant in session court for delivery of vacant possession and recovery of the outstanding rental for the above premises;

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(3) The plaintiff then filed an application for summary judgment;

(4) On 13 April 2017, the sessions court granted the plaintiff's application and the vacant possession. The defendant filed an appeal to the High Court against the decision of the session court;

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(5) On 22 June 2018, the High Court judge dismissed the appeal. On 16 July 2018, defendant filed an appeal to the Court of Appeal against the decision of the High Court;

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Judgment by the High Court judge ('HCJ')

(6) The HCJ found that there is no merits in the appeal and dismissed the appeal. The reasons are as follows:

Jurisdiction of the sessions court judge

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(7) The learned counsel for the defendant contended that defendant in his statement of defence had pleaded a challenge to the plaintiffs title to Lot 289. Therefore, they contended since it is an issue which relates to one of immovable property, the SCJ has no jurisdiction to determine the issue by virtue of limitation imposed by s 69 of the Subordinate Courts Act 1948 ('the SCA 1948');

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(8) The HCJ of the view that the learned counsel for the defendant had not factor in the operability of s 66 of the SCA 1948. It is germane to note that it is the defendant who had raised the issue of the plaintiff's title to Lot 289 in his statement of defence and by doing so, the defendant himself was caught within the exceptions under s 66(1) of the SCA 1948;

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(9) After considered all the authorities by parties, the HCJ of the view that the issue pertaining the jurisdiction of the SCJ has no merit;

Res judicata and issue estoppel

- A** (10) The basis of the plaintiff's claim against the defendant is the second tenancy agreement dated 5 June 2013 whereas the crux of the defendant defence is that the defendant is not a tenant but the beneficial owner of Lot 289;
- B** (11) In the present appeal, the essence of the triable issue raised by the defendant is that he is the beneficial owner of Lot 289 and not the tenant as claimed by the plaintiff;
- C** (12) After examining the appeal record, the HCJ found that pursuant to the sale and purchase agreement dated 8 September 2009, Lot 289 was transferred to the plaintiff (1/2 shares), Chan Chee Leong (1/4 shares) and Emily Khoo Sook Lin (1/4 shares) on 10 February 2010. Subsequently, both Chan Chee Leong and Emily Khoo Sook Lin executed the memorandum of transfer (Form 14A) on 19 April 2012 to transfer their respective 14 share in Lot 289 in favor of plaintiff. The memorandum of private search on Lot 289 reveals that the transfer for Lot 289 from Chan Chee Leong and Emily Khoo Sook Lin to the plaintiff was registered on 4 June 2012;
- D** (13) The defendant defaulted in his rental payments and the plaintiff had two notices of demand, dated 4 January 2016 and 14 January 2016 sent to the defendant to claim for outstanding rental. The defendant made some partial payments but still in default of the outstanding rental;
- E** (14) The defendant then entered a private caveat dated 21 February 2016 against Lot 289 claiming that he has an interest in Lot 289 as the purchaser and he has paid the 10% deposit to the vendor (Daphne Choy Gaik Choo) towards the purchase;
- F** (15) The plaintiff then commenced an action at the Penang High Court to remove the private caveat entered by the defendant on Lot 289 vide Originating Summons No PA-24NCVC-301-03 of 2016. The HCJ (YA Puan Hadhariah Syed Ismail) had allowed the application to remove the caveat. The defendant had appeal to the Court of Appeal against the decision of the High Court. The Court of Appeal dismissed the appeal and affirmed the decision of the High Court;
- G** (16) Based on the premise, the HCJ opined that in the present appeal, the issue of ownership of Lot 289 has been ventilated by the parties in the originating summons and decided by the High Court. This decision was later affirmed by the COA in Appeal No P-02(NCVC)(A)-2263-12 of 2016;
- H** (17) Prior to the hearing of the present appeal, the defendant had earlier applied (encl 12) for stay of execution before this court to stay the execution of the judgment of the session court in allowing the plaintiff's application for summary judgment. The High Court had dismissed the defendant's application for stay. Defendant's appeal to the Court of Appeal in Appeal No P-04(IM)(NCvC)-340-08 of 2017 was dismissed by COA; and
- I** (18) In the present appeal, the High Court too retains no exceptions. The findings of the COA in dismissing the defendant application for stay of execution on issue of estoppel and res judicata is binding on this court and as a matter of upholding the hierarchical system.

[7] The memorandum of appeal for Appeal 'No 354' read as follows:

- (1) The learned High Court Judge erred in law and in fact in dismissing the Appellant's Notice of Appeal against the summary judgment granted by the Sessions Court on 13.4.2017, and in so doing would appear to make a finding that the transfer of the subject property to the Respondent, Chan Chee Leong and Emily Khoo Sook Lin is conclusive as against the Appellant, thereby disregarding the undisputed fact that the said transfer was a result of the Letter of Nomination dated 26.8.2009 and the Sale and Purchase Contract dated 5.8.2009 between Daphne Choy Gaik Choo as vendor and the Appellant as purchaser. **A**
- (2) The learned High Court Judge erred in law and in fact in finding that the issue of ownership of the subject property has been ventilated by the parties in the Originating Summons for the removal of the private caveat lodged by the Appellant and affirmed by the Court of Appeal, and in so doing failed to appreciate that a caveat is not a cause of action but a mere statutory notice or relief for the interim preservation of immovable property pending the determination by the Court of the caveator's claim to title. **B**
- (3) The learned High Court Judge erred in law and in fact in holding that the threshold of proof in respect of the issue of ownership would remain the same and is not differentiated by the nature of proceedings, and in so doing failed to appreciate that the burden of proof on the issue whether the Appellant had a caveatable interest is entirely different from the burden of proof on the issue of whether the Respondent is entitled to summary judgment for vacant possession in the face of the triable issues raised by the Appellant. **C**
- (4) The learned High Court Judge erred in law and in fact in holding that the Appellant was caught within the exception under Section 66(1) of the Subordinate Courts Act 1948, in so doing failed to appreciate that the 'competence or the duty of the Sessions Court to dispose of the whole matter in controversy, so far as relates to the demand of the plaintiff and any defence thereto', does not enable the Sessions Court to allow summary judgment in the face of triable issues which are not in dispute, nor does it affect the relief which the Sessions Court has no jurisdiction to award. **D**
- (5) The learned High Court Judge erred in law and in fact in holding that the issue of want of jurisdiction of the Sessions Court is devoid of merit, and in so doing failed to appreciate that the Appellant's counterclaim is clearly beyond the jurisdiction of the Sessions Court and hence, had not been addressed and remains pending to date. **E**
- (6) The learned High Court Judge erred in law and in fact in holding that the Court is bound by the doctrine of stare decisis in that the Court of Appeal had dismissed the Appellant's Notice of Motion for interim stay of the summary judgment on grounds of issue estoppel and res judicata, and in so doing failed to appreciate that the issues raised in the caveat proceedings, do not in law raise any issue estoppel or res judicata nor do they affect the triable issues raised in the proceedings before the Sessions Court. **F**
- (7) The learned High Court Judge erred in law and in fact in holding that the Appellant had failed to raise any triable issues and that there is no merit in the appeal, and in so doing failed to appreciate that the Defence and Counterclaim itself **G**
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A does raise triable issues not only in respect of the Respondent's claim for vacant possession, but also in respect of the Respondent's claim for arrears of rental.

B (8) The learned High Court Judge erred in law and in fact in dismissing the Appellant's Notice of Appeal and in so doing failed to appreciate that in the light of the triable issues, the Appellant is entitled in law to challenge the very claim for arrears of rental and the tenancy agreement itself by way of viva voce evidence to disclose the very nature of the transactions as between the Respondent and the Appellant.

CONCLUSION

C (9) The learned High Court Judge erred in law and in fact in failing to appreciate that the said summary judgment should not have been allowed where there are serious triable issues as to whether the Respondent and his family members are indeed mere nominees of the Appellant, more so in the light of the undisputed Letter of Nomination dated 26.8.2009.

D [8] The brief facts and grounds of judgment of the learned High Court judge in Appeal 'No 362' read as follows:

BRIEF FACTS OF CASE

E (1) The plaintiff is the registered proprietor and landlord of the subject property ie premises No 38 and 40 at Jalan Pintal Tali, Penang;

(2) The defendant claimed to be the de facto owner and/or bona fide purchaser for value of the subject property and/or as occupier with equitable interest;

F (3) On 13 April 2017, the plaintiff obtained summary judgment for arrears of rental and vacant possession. On 22 May 2017, plaintiff obtained an order for leave to issue execution. On 5 June 2017, plaintiff filed a writ of possession for the judgment sum amounting to RM126,809.59;

G (4) On 2 May 2017, defendant filed a notice of application for stay of execution of the summary judgment and it was dismissed by the session judge on 1 August 2017. On 2 August 2017, the High Court had dismissed the defendant's application for stay;

H The defendant's appeal to the Court of Appeal in Appeal No P-04(IM)(NCvC)-340-08 of 2017 was dismissed on 13 March 2018 (the defendant's application to set aside the COA's decision on grounds of coram failure (defendant appealed for YA Datuk Nallini and YA Dato' Zabariah to recuse but was dismissed) and for the appeal to be reopen and reheard by different panel was dismissed by COA on 15 November 2018);

I (5) On 31 July 2017, defendant filed a notice of application to strike out the writ of possession dated 5 June 2017, the bailiff's notice dated 20 July 2017 and the notice of seizure and inventory;

(6) On 3 August 2017, plaintiff had executed the said writ of possession, the bailiffs notice and the notice of seizure and inventory;

(7) On 12 December 2017, the sessions judge dismissed the defendant's application

to strike out the writ of possession, the bailiff's notice and the notice of seizure and inventory. The defendant filed an appeal to the High Court against the decision of the sessions court;

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(8) On 3 July 2018, the High Court judge dismissed the appeal. On 23 July 2018, defendant filed an appeal to the Court of Appeal against the decision of the High Court.

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ALASAN KEPUTUSAN HMS

(9) Writ pemilikan bertarikh 5 Jun 2017, notis bailif bertarikh 20 Julai 2017 dan notis penyitaan dan inventori adalah perintah mahkamah yang sah;

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(10) Mahkamah tiada kuasa untuk mendengar semula perkara yang sama dan prinsip 'functus officio' terpakai;

(11) Isu yang sama telah didengar di Mahkamah Tinggi dalam rayuan berkaitan penangguhan perlaksanaan penghakiman terus dan telah ditolak.

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ALASAN KEPUTUSAN HMT

Alasan (i) — Isu penghakiman terus tidak di ekstrak dalam bentuk yang ditetapkan iaitu Borang 75, A 42 k 5 KKM 2012

(12) Penghakiman terus mula berkuatkuasa dari tarikh ianya ditarikahkan iaitu pada 13 April 2017. Penghakiman telah difailkan oleh plaintif pada 21 April 2017 dan dimeteraikan;

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(13) Permohonan defendan telah menjadi akademik kerana writ pemilikan, notis bailif dan notis penyitaan dan inventori telah dilaksanakan dengan sempurna pada 3 Ogos 2017 dan milikan kosong telah diserahkan kepada, plaintif pada 3 Ogos 2017;

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(14) Defendan juga telah merayu terhadap penghakiman terus yang dikatakan tidak mematuhi A 46 k4. Defendan tidak dibenarkan untuk *approve* dan *reprobate*. Ini menunjukkan tindakan mala fide oleh defendan untuk memprejudiskan proses perlaksanaan plaintif;

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(15) Isu ketidakpatuhan A 46 k 4 juga tidak ditimbulkan semasa proses perlaksanaan dan semasa penghakiman diserahkan kepada defendan. Defendan kini di estop dari mencabar penghakiman tersebut;

Alasan (ii) — Isu samada kebenaran untuk perlaksanaan diperolehi melalui misrepresentasi fakta bahawa terdapat penghakiman yang diekstrak menyebabkan writ pemilikan tidak dimeteraikan menurut A 46 k 4(a)(i) yang seterusnya menyebabkan writ pemilikan, notis bailif dan notis penyitaan dan inventori adalah tidak sah

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(16) Isu ini telah diputuskan oleh Mahkamah Tinggi dalam permohonan defendan untuk penggantungan perlaksanaan pada 2 Ogos 2017;

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(17) Penghakiman terus telahpun difailkan pada 21 April 2017 dan dimeteraikan. Oleh itu penghakiman adalah teratur;

(18) Isu ini juga tidak ditimbulkan semasa penghakiman diserahkan kepada defendan. Defendan kini di estop untuk menimbulkan isu tersebut;

- A (19) Rayuan defendan di Mahkamah Tinggi untuk penggantungan pelaksanaan telah ditolak pada 4 Oktober 2017 dan isu-isu yang sama telah diputuskan. Oleh itu, prinsip *estoppel*, *res judicata* dan *functus officio* terpakai;
- (20) Writ pemilikan, notis bailif dan notis penyitaan dan inventori adalah teratur dan sah;
- B *Isu (iii) — Isu samada defendan adalah pemilik beneficial premis No 38 dan 40 tersebut*
- (21) Defendan menyatakan telah membelanjakan wang yang banyak untuk mengubahsuai premis tersebut sehingga menjadi satu premis yang tidak boleh dipisahkan dari segi struktur dan fungsi;
- C (22) Isu pemilikan beneficial ini telah diputuskan oleh Mahkamah Rayuan. Oleh itu defendan di estop dari membangkitkan isu yang sama;
- Alasan (iv) — Isu writ penyitaan dan penjualan tidak dimeteraikan mengikut A 45 k 1*
- D (23) Isu ini tidak dibangkitkan di mahkamah sesyen semasa pelaksanaan writ tersebut. Defendan tidak boleh merayu terhadap isu yang tidak ditimbulkan di mahkamah sesyen;
- (24) Aturan 45 k 3(4) KKM tidak menghalang penggunaan writ pemilikan untuk pelaksanaan penghakiman dalam bentuk bayaran kewangan; dan
- E (25) Bailif dibenarkan untuk membuat pelaksanaan ke atas harta defendan untuk melaksanakan penghakiman untuk wang sejumlah RM126,809.56 yang diperintahkan dibayar kepada plaintif.
- F [9] The memorandum of appeal for Appeal ‘No 362’ reads as follows:
- NON-COMPLIANCE WITH RULES OF COURT 2012
- G 1. The learned High Court Judge erred in law and in fact in dismissing the Appellant’s Notice of Appeal against the decision of the Sessions Court dated 12.12.2017 in dismissing the Appellant’s Notice of Application to strike out the Writ of Possession granted by the Sessions Court on 5.6.2018 for recovery of vacant possession of premises Nos. 38 and 40, Jalan Pintal Tali, Penang (subject property), and for the recovery of arrears of rental, including double rental in the sum of RM110,000.00, together with interest and costs, and in so doing failed to appreciate the following:
- H — that the Leave To Issue Writ of Possession dated 22.5.2017 and the Writ of Possession itself dated 5.6.2017 had been obtained without a sealed Judgment for vacant possession being extracted as prescribed under Order 42 rule 5 of the Rules of Court, 2012;
- I — that in the absence of a judgment in Form 75 as prescribed under Order 42 rule 5 of the Rules of Court, 2012, and extracted following the Order of the Sessions Court dated 13.4.2017 allowing the Respondent to enter final judgment against the Appellant, the Writ of Possession dated 5.6.2017 had not been sealed in compliance with Order 46 rule 4(4)(a)(i) of the Rules of Court, 2012;

— that in the light of the provisions of the Rules of Court, 2012, a subsidiary legislation, the Writ of Possession dated 5.6.2017, the Bailiff Notice dated 20.7.2017 and the ‘Notis Penyitaan Dan Inventori’ dated 20.7.2017 issued by the Court Bailiff are invalid for purposes of recovery of vacant possession of the subject property and for the sum of RM126, 809.59 pursuant to the Writ of Possession;

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— that in the absence of a final judgment for vacant possession as prescribed under Order 42 rule 5 of the Rules of Court, 2012, the leave to issue Writ of Possession and the execution of the Writ of Possession on 3.8.2017 are indeed an abuse of process of the Court; and

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— that in the absence of a Writ of Seizure and Sale as prescribed under Order 45 rule 1 of the Rules of Court, 2012, for purposes of recovery of arrears of rental, let alone any praecipe filed for Writ of Seizure and Sale, the execution of the Notice of Seizure and Inventory for the recovery of arrears of rental on 3.8.2017 is an abuse of process of Court.

C

VIOLATION OF APPELLANT’S PROPRIETARY RIGHT IN ADJOINING PROPERTY

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2. The learned High Court Judge erred in law and in fact in failing to appreciate that the Writ of Possession dated 5.6.2017 is in violation of the Appellant’s proprietary right in premises No 42, Jalan Pintal Tali, Penang on Lot No 290 (the adjoining property) in that the recovery of possession of the subject property could not be effected given the following:

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(i) that the subject property and the adjoining property had been collectively renovated, refurbished and restored by the Appellant at his own cost and expense into one integral and inseparable premises as a boutique heritage hotel, both structurally and functionally;

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(ii) that the Appellant’s access to the 2nd and 3rd floors of the adjoining property is dependent upon access through the subject property having regard to the following undisputed facts:-

— the party walls on the ground floor, 1st floor, 2nd floor and roof-top separating the adjoining property from the subject property had been substantially removed;

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— the staircase in the adjoining property had been altered and provides access to the first floor only, and that the second floor and roof-top thereof are only accessible via the reconstructed staircase in premises No 40, Jalan Pintal Tali, Penang (part of the subject property);

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— the rooms on the 1st floor and 2nd floor of the adjoining property had been renovated and extended into the floors of premises No 40, Jalan Pintal Tali, Penang (part of the subject property); and

— the staircase in premises No 38, Jalan Pintal Tali, Penang (part of the subject property) had been removed altogether and that the 2nd floor and the roof-top are only accessible via the said reconstructed staircase in premises No 40, Jalan Pintal Tali, Penang (part of the subject property).

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DAMAGING CONSEQUENCES ON INTEGRITY OF HERITAGE BOUTIQUE HOTEL AND APPELLANT’S CLAIM

- A** 3. The learned High Court Judge erred in law and in fact in failing to appreciate that the said Writ of Possession would not only have damaging consequences on the integrity of the heritage boutique hotel situated on both the subject property and adjoining property, but the equitable considerations in favour of the Appellant's claim to be the beneficial owner and/or bona fide purchaser for value of the subject property.
- B** SESSIONS COURT'S DECISION REFLECTING RESPONDENT'S CONTENTIONS
- C** 4. The learned High Court Judge erred in law and in fact in failing to appreciate that the Sessions Court in dismissing the Appellant's Notice of Application to strike out the said Writ of Possession had accepted the contentions raised by the Respondent notwithstanding that the contentions are misconceived in law and without merit for the following reasons that contrary to the Respondent's contention, the Notice of Application is not academic as at all material times of the execution of the Writ of Possession, Notice of Seizure and Inventory and the Bailiff's Notice on 3.8.2017,
- D** the Notice of Application to strike out the said Writ of Possession filed on 31.7.2017 was then pending and subsisting;
- that contrary to the Respondent's contention, an order for leave to enter final judgment is not an order nor judgment for vacant possession in Form 75 as prescribed under Order 42 rule 5 of the Rules of Court, 2012, and accordingly is not only in breach of the requirement of a final judgment or order for vacant possession for leave to issue Writ of Possession, but is in violation of the Practice Direction No 4 of 2010;
- E**
- that contrary to the Respondent's contention, the decisions of the Sessions Court, the High Court and the Court of Appeal in refusing stay of execution of the summary judgment, do not in any way validate the wrongful execution process nor do they nullify the Appellant's Notice of Application to strike out the Writ of Possession;
- F**
- that contrary to the Respondent's contention, the Sessions Court is not 'functus officio' and would have the necessary jurisdiction to hear the Notice of Application to strike out the Writ of Possession; and
- G**
- that contrary to the Respondent's contention, the issue as to whether the Respondent is entitled or justified to enforce the Writ of Possession is a live issue, and had not been previously determined or concluded by the High Court.
- H** ISSUES OF OWNERSHIP AND TITLE AND QUESTIONS OF JURISDICTION
- I** 5. The learned High Court Judge erred in law and in fact in failing to appreciate that the said Writ of Possession should not have been issued, given that there are pending and unresolved issues of ownership and title to the subject property and questions of jurisdiction of the Sessions Court vis-a-vis the jurisdiction of the High matters involving immovable property.
- EXTRANEIOUS MATTERS
6. The learned High Court Judge erred in law and in fact in allowing Counsel for the

- Respondent to include in her submission, matters which had no bearing on the Writ of Possession, including the following:-
- the decisions and/or findings of the High Court in response to the issues or contentions raised by the Respondent when removing the caveat lodged by the Appellant on the subject property under Originating Summons No PA-24NCVC-301-03/2016, notwithstanding that the caveat is not a cause of action and had no bearing on neither the summary judgment nor the Writ of Possession;
- post facto matters and decisions in respect of the dismissal by the Court of Appeal of the interim stay of the summary judgment and the Appellant's appeal against the High Court's refusal of stay of the summary judgment, and the dismissal by the High Court of the Appellant's Writ action against the Respondent and his family members under Penang High Court Civil Suit No PA-22NCVC-92-05/2017, notwithstanding that the contentious or triable issues raised therein had not been determined by the Court of Appeal or the High Court.
- CONCLUSION
7. The learned High Court Judge erred in law and in fact in failing to appreciate that the said Writ of Possession is clearly without basis and an abuse of the process of Court in the face of the non-compliance of the relevant Rules of Court, 2012 and the severity or gravity of the contentious or triable issues raised, and in so doing failed to address or consider adequately the grounds or representations raised on behalf of the Appellant.
- [10] We have read the appeal records and the able submissions of the parties. After having given much considerations to the submissions of the respondent, we take the view that the appeal should be allowed. Our reasons, inter alia, are as follows:
- (a) the facts of this case is quite unique and currently is not related to the indefeasibility argument of rem rights in the properties. We do not think it is proper to deal with the law on the subject and apply to the facts where in our view the appellant has raised triable issues to satisfy the requirement to have the matter heard by full trial;
- (b) we have read the submission of the learned counsel for the respondent which is anchored on indefeasibility doctrine. Indefeasibility doctrine may be good for rem rights but not for personam rights as personam rights will relate to relief as to damages and compensation. To put it mildly, rem right is related to who is the owner of the property. Personam right among others may relate to suitable compensation or damages, etc as the case may be;
- (c) even if we are wrong in our analysis and view, we take the view that this is a fit and proper case for the trial court to have invoked O 14 r 3 of the Rules of Court 2012 ('the RC 2012') and ordered a trial of the claim (see *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999])

- A 1 MLJ 657; [1999] 2 AMR 1561); and
- (d) O 14 r 3(1) of the RC 2012 states:
- 3 Judgment for plaintiff (O 14, r 3)
- B (1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.
- C
- [11] There are a number of cases which had dealt with similar provision like O 14 r 3(1) of the RC 2012 in Malaysia as well as outside the country. They are as follows:
- D (a) in *Miles v Bull* [1968] 3 All ER 632, Megarry J observed:
- E Under rule 3 and rule 4 of the present RSC Order 14, the defendant can obtain leave to defend if ... the defendant satisfies the court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial. These last words seem to me to be very wide. They also seem to me to have special significance where (as here) most of all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross examination those which will aid her. If the defendant cannot point to a
- F specific issue which ought to be tried, but nevertheless satisfies the court that there are circumstances that ought to be investigated, then I think those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff. The words 'there ought for some other reason to be a trial' seem to me to give the court adequate powers to confine RSC Order 14 to being a good servant and prevent it from being a bad master. If I may adopt the language of Lord Parker of Waddington in *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* (1916–17) All ER Rep 191, referred to in the notes to RSC Order 14 in *The Supreme Court Practice* 1967, if the circumstances of the case are 'such as to require close investigation', this will 'preclude the propriety of giving leave to sign judgment under Order 14 rule 1. The question is thus whether this is such a case'.
- G
- H
- I (b) in *Ngai Heng Book Binder Pte Ltd v Syntax Computer Pte Ltd* [1988] 2 MLJ 205, the issue before the court was whether O 14 r 3(1) of the RC 2012 will apply, where liability is not denied but the specific sum is disputed. The court, inter alia, held that the present action concerns a specific sum and as that is seriously disputed by the defendants, summary judgment may not be entered for the sum claimed or part thereof, and

that leave to defend should have been given;

A

- (c) in *Peninsular Land Development Sdn Bhd v K Ahmad* [1970] 1 MLJ 149, Azmi LP observed:

As a general rule where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence he ought to have been given leave to defend (see *Saw v Hakim, Ironclad etc Co v Gardner*) but the discretion lies with the judge and the defendant must show such facts as might be deemed sufficient to entitle him to defend.

B

- (d) in *John Lo Thau Fah v FACB Resorts Berhad* [2007] 4 MLJ 685; [2007] 8 CLJ 484, the court on the facts observed:

C

It must be emphasised that the court has a wide discretion not to allow the plaintiff to enter summary judgment if the court for some other reason takes the view that there ought to be a trial of the whole or part of the claim. This is specifically spelled out in RHC O 14 r 3(1). This part of the rule was considered in *Concentrate Engineering Pte Ltd v UMBC Bhd* [1990] 3 MLJ 1. In that case the plaintiff, a customer of the defendant, claimed that the defendant wrongly paid out on the cheques, which were purported to be issued by the plaintiff. On the facts it became evident that the cheques were duplicate copies fraudulently printed with the same serial numbers as the genuine and unused cheques supplied by the defendant. However, the signatures on the cheques were declared by expert evidence to have been traced from genuine signatures. The court held that the circumstances and audacity with which the fraud was carried out and the absence of an explanation by the directors of the plaintiff constitute 'some other reason' for a trial in terms of O 14 r 3(1). Further, the court stated that the circumstances disclosed called for further investigation.

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[12] We take the view that both appeals must be allowed with costs. The writ action must be fixed for trial.

G

We hereby order so.

The appellant's appeal allowed with costs.

H

Reported by Mohd Kamarul Anwar

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